IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ADMIRALTY & VICE ADMIRALTY JURISDICTION

NOTICE OF MOTION NO. 2346 OF 2006

IN

ADMIRALTY SUIT NO. 12 OF 2006

M/S. KIMBERLY-CLARK LEVER
PVT. LTD.
having its office at GAT Nos.
934 to 937, Off Nagar Road,
Village Sanaswadi, Tal. Shirur,
Dist. Pune 412 203. ..PLAINTIFFS

V/S

1. M.V. EAGLE EXCELLENCE,
a Foreign Flag Vessel presently
at Nhava Sheva International
Container Terminal along with
her hull, tackle, machinery,
engines, boats, apparel and
other paraphernalia.

2. All persons interested in the
motor vessel ’EAGLE EXCELLENCE’. ..DEFENDANTS

V.C. KOTWAL WITH V.R. DHOND, ASHISH KAMAT I/B A. MEHTA LALJEE & CO. FOR PETITIONER.

RAHUL NARICHANIA WITH K.R. SRIRAM FOR DEFENDANT NO. 1.

CORAM : D.K. DESHMUKH, J.

DATE : 14TH FEBRUARY, 2007.

JUDGMENT

1. This Notice of Motion is taken out by the defendant. There are various reliefs claimed by this Notice of Motion. Learned counsel appearing for the defendant however submits that he is pressing only for the relief claimed by prayer clause (d) and (e). Learned counsel for the defendant submits that plaintiff had secured an ex parte order of arrest of the vessel and therefore the defendant had to furnish security for the release of the vessel. By this Notice of Motion the defendant is seeking release of the bank guarantee which was furnished by the defendant for securing release of the vessel. Learned counsel submits that the present suit has been filed for recovery of the damages. According to the plaintiff, machine of the plaintiff which was entrusted to the defendants was damaged while it was in the actual possesion of the defendant and for repairing that machine expenses were required to be incurred by the plaintiff and

the plaintiff also suffered loss because the machine

could not be put to use because it was in damaged condition. According to the learned counsel even if the case of the plaintiff is accepted that the machine was damaged while it was in transit and in custody of the defendant, then also it was the duty of the plaintiff to have joint survey of the machine carried out before the machine is actually handed over for repair. That was admittedly not done. It is further submitted that then it was the duty of the plaintiff to proceed in such a manner as any ordinary prudent man would have done and therefore it was necessary for the plaintiff to call for tenders from the persons who are in the business of repairing such machines and then offer the work to a person who is ready to do it for the lowest amount. The plaintiff has admittedly not done so. According to the learned counsel the plaintiff is also claiming Rs. one lac towards the insurance claim, expenses and surveyor expenses. No documents have been produced. Learned counsel submits alongwith the reply filed in this Notice of Motion some documents have been produced by the plaintiff to support its claim for repair charges and for cost of

the parts of the machinery which were required to be replaced but the documents shows that the machine

 was completely repaired and put to use in October but the quotations are of the month of November 2005 and onwards. Though admittedly according to the plaintiff the machine was in working condition in the month of October 2005. Learned counsel appearing for the defendant on the other hand submitted that the joint survey of the machine was not carried out because the defendant had denied that it has any privity of contract with the plaintiff. Learned counsel for the plaintiff submitted that the plaintiff had taken steps to mitigate the losses. Learned counsel pointed out that when the parts were required to be replaced they were purchased at lowest price. According to the learned counsel all the care that is required of the ordinary prudent man was taken to get the machine repaired. Learned counsel relied upon the judgment in the matter of G.A. Jolli v. The Dominion of India reported in AIR (36) 1949 Calcutta 380. Now it is admitted position that this suit is for recovery of the damages which according to the plaintiff it has suffered because of the breach of the contract committed by the defendant. Normally in a suit for damages interim order for securing the

decree that may be passed in the suit is not made because the amount of the damages gets crystalised

only on the date of the decision of the suit. Therefore in order to get an interim order especially an interim order like requiring the defendant to furnish security for the decree that may be passed in favour of the plaintiff in a suit for damages the plaintiff will have to make out an extremely strong prima facie case. So far as the present case is concerned the plaintiff is claiming Rs. one lac towards insurance claim, expenses and surveyor expenses. Admittedly no documents have been produced in support of this claim. The plaintiff claims that during the course of repairs certain part were require to be replaced and therefore price of those parts is claimed by the plaintiff from the defendant. It was submitted that during the course of repairs, the parts which were in store with the plaintiff were used, thereafter quotations were called from the market and the price that was quoted is being claimed in the suit. In law, assuming everything in favour of the plaintiff, the plaintiff would be entitled to claim the price of the parts which was prevailent at the time when repairs were being carried out. Admittedly, the

parts were not purchased at the time when repairs

were carried out. The parts were already purchased and were in store with the plaintiff. It cannot be the case of the plaintiff that there is no variation in the price of the parts because, then it would not have been necessary for the plaintiff to call for quotation in the month of November. There is no evidence produced on record to show what was the price of the parts at the time when the repairs were carried out. Price at which the plaintiff has purchased the parts which have been used is not dislcosed. Thus there is no evidence on record showing the costs of the parts which were actually used in repairing the machine. I do not find either any pleadings or any evidence to show that before carrying out repair to the machine the plaintiff had taken any care to find out as to how many agencies are doing such type of repairs. No attempt has been made to call for the tenders from those persons to find out who is willing to carry out the repairs at the lowest price. In my opinion this care is required to be taken by the plaintiff before carrying out any repairs to the machine if he wants

the defendant to reimburse it . So far as the claim of the plaintiff that they have incurred expenses in excess of Rs. 4 crores for repairs

there are no documents produced on record but there is only affidavit of one person produced on record to support their claim. Perusal of section 73 of the Contract Act shows that in case of breach of contract, damages which will naturally arise in the usual course of things from such breach or which the parties knew, when they made the contract, to be likely to result from such breach, such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach. I do not find that the defendant had any reason to know what is the amount necessary for carrying out repair work of the machine when the contract was entered into. In my opinion in such a case mere affidavit of a person will not be sufficient to establish the amount of loss or damages. Taking overall view of the matter I am of the opinion that plaintiffs do not have even a prima facie case to claim damages. Notice of Motion is therefore granted in terms of prayer clause (b). Notice of Motion is disposed of.

3. At this stage at the request of the learned counsel appearing for the plaintiff it is directed that the Bank Guarantee which is directed to be

released by this order shall be released only after a period of 4 weeks.

(D.K. DESHMUKH, J.)